Internal Revenue
bulletin

Bulletin No. 1999–32
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HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

T.D. 8829, page 235.

REG–116991–98, page 242.

Temporary and proposed regulations under section 7122 of the Code relate to the compromise of tax liabilities.

EMPLOYEE PLANS

Announcement 99–77, page 243.

The Service announces three actions as a result of the Ninth Circuit's opinion in *Boyd Gaming Corporation v. Commissioner*. The Service (1) acquiesces in the opinion, (2) withdraws proposed training materials relating primarily to the application of section 119 of the Code to employer-provided meals in the hospitality industry, and (3) terminates the settlement initiative related to this issue. The Action on Decision memorandum is included in this announcement.

EXEMPT ORGANIZATIONS

Announcement 99–83, page 245.

A list is given of organizations now classified as private foundations.

ADMINISTRATIVE

Announcement 99–81, page 244.

The Service will make Litigation Guideline Memoranda issued between January 1, 1986, and October 20, 1998, available for public inspection.

Announcement 99–82, page 244.

This document contains a correction to the recovery period for certain personal property used in a rental real estate activity (appliances, carpeting, furniture, etc.) referred to in the 1998 Instructions for Form 4562, Depreciation and Amortization, and in Publication 527, Residential Rental Property.

Finding Lists begin on page ii.
Actions Relating to Court Decisions begins on page 234.

Department of the Treasury
Internal Revenue Service

Mission of the Service

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are consolidated semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The first Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the first Bulletin of the succeeding semiannual period, respectively.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Actions Relating to Court Decisions

It is the policy of the Internal Revenue Service to announce at an early date whether it will follow the holdings in certain cases. An Action on Decision is the document making such an announcement. An Action on Decision will be issued at the discretion of the Service only on unappealed issues decided adverse to the government. Generally, an Action on Decision is issued where its guidance would be helpful to Service personnel working with the same or similar issues. Unlike a Treasury Regulation or a Revenue Ruling, an Action on Decision is not an affirmative statement of Service position. It is not intended to serve as public guidance and may not be cited as precedent.

Actions on Decisions shall be relied upon within the Service only as conclusions applying the law to the facts in the particular case at the time the Action on Decision was issued. Caution should be exercised in extending the recommendation of the Action on Decision to similar cases where the facts are different. Moreover, the recommendation in the Action on Decision may be superseded by new legislation, regulations, rulings, cases, or Actions on Decisions.

Prior to 1991, the Service published acquiescence or nonacquiescence only in certain regular Tax Court opinions. The Service has expanded its acquiescence program to include other civil tax cases where guidance is determined to be helpful. Accordingly, the Service now may acquiesce or nonacquiesce in the holdings of memorandum Tax Court opinions, as well as those of the United States District Courts, Claims Court, and Circuit Courts of Appeal. Regardless of the court deciding the case, the recommendation of any Action on Decision will be published in the Internal Revenue Bulletin.

The recommendation in every Action on Decision will be summarized as acquiescence, acquiescence in result only, or nonacquiescence. Both "acquiescence" and "acquiescence in result only" mean that the Service accepts the holding of the court in a case and that the Service will follow it in disposing of cases with the same controlling facts. However, "acquiescence" indicates neither approval nor disapproval of the reasons assigned by the court for its conclusions; whereas, "acquiescence in result only" indicates disagreement or concern with some or all of those reasons. Nonacquiescence signifies that, although no further review was sought, the Service does not agree with the holding of the court and, generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a nonacquiescence indicates that the Service will not follow the holding on a nationwide basis. However, the Service will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.

The announcements published in the weekly Internal Revenue Bulletins are consolidated semiannually and annually. The semiannual consolidation appears in the first Bulletin for July and in the Cumulative Bulletin for the first half of the year, and the annual consolidation appears in the first Bulletin for the following January and in the Cumulative Bulletin for the last half of the year.

The Commissioner ACQUIESCES in the following decision:

Boyd Gaming Corporation v. Commissioner,[1]
___F.3d___(9th Cir. 1999), rev'g T.C. Memo. 1997-445 T.C. Dkt. Nos. 3433-95, 3434-95

[1] Acquiescence relating to whether a meal furnished by the taxpayer/employer on its business premises to an employee is furnished for "the convenience of the employer" within the meaning of that phrase in section 119 of the Internal Revenue Code.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 7122.–Compromises

26 CFR 301.7122–1T: Compromises (temporary).

T.D. 8829

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 301

Compromises

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that provide additional guidance regarding the compromise of internal revenue taxes. The temporary regulations reflect changes to the law made by the Internal Revenue Service Restructuring and Reform Act of 1998 and the Taxpayer Bill of Rights II. The text of these temporary regulations serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in REG–116991–98, on page 242.

DATES: *Effective date.* These temporary regulations are effective July 21, 1999.

Applicability date. For dates of applicability, see §301.7122–1T(j) of these regulations.

FOR FURTHER INFORMATION CONTACT: Carol A. Campbell, (202) 622-3620 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations amending the Procedure and Administration Regulations (26 CFR part 301) under section 7122 of the Internal Revenue Code (Code). The regulations reflect the amendment of section 7122 by section 3462 of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 1998") Public Law 105–206, (112 Stat. 685, 764) and by section 503 of the Taxpayer Bill of Rights II Public Law 104–168, (110 Stat. 1452, 1461).

As amended by RRA 1998, section 7122 provides that the Secretary will develop guidelines to determine when an offer to compromise is adequate and should be accepted to resolve a dispute. The legislative history accompanying RRA 1998 explains that Congress intended that factors such as equity, hardship, and public policy be evaluated in the compromise of individual tax liabilities, in certain circumstances, if such consideration would promote effective tax administration. H. Conf. Rep. 599, 105th Cong., 2d Sess. 289 (1998).

The current regulations under Treasury regulation §301.7122–1 permit the compromise of cases on only the grounds of doubt as to collectibility, doubt as to liability, or both. These regulations are being removed. Like the current regulations, the temporary regulations provide for compromise based on doubt as to liability and doubt as to collectibility; however, they also provide for compromise based upon specific hardship and/or equitable criteria if such a compromise would promote effective tax administration. The inclusion in these regulations of a standard that will allow compromise on grounds other than doubt as to liability or doubt as to collectibility represents a significant change in the IRS' exercise of compromise authority.

Section 7122 of the Code provides broad authority to the Secretary to compromise any case arising under the internal revenue laws, as long as the case has not been referred to the Department of Justice for prosecution or defense. Although the statutory language of Section 7122 does not explicitly place limits on the Secretary's authority to compromise, opinions of the Attorney General and the regulations issued under section 7122 prior to RRA 1998 authorized the Secretary to compromise a liability under the revenue laws only when there was doubt as to liability (uncertainty as to the existence or amount of the tax obligation) or doubt as to collectibility (uncertainty as to the taxpayer's ability to pay). The opinion of the Attorney General most often cited as the principal source of these limitations is the 1933 opinion of Attorney General Cummings that was issued in response to an inquiry from then Acting Secretary of the Treasury Acheson.

In requesting an opinion from the Attorney General, Acting Secretary of the Treasury Acheson expressed concern that the country was trying to recover from the depression. He suggested that the public interest required compromise of tax claims where collection of the tax would "destroy a business, ruin a tax producer, throw men out of employment, or result in the impoverishment of widows or minor children of a deceased taxpayer." The Secretary expressed the belief that in ordinary times, compromise of cases on public policy grounds should be rare but that, in light of the current state of the country, public policy should play a significantly greater role. Expressing the belief that it was more important that "the business of the taxpayer be preserved and not destroyed," Acting Secretary Acheson suggested that cases should be compromised where the taxpayer is insolvent, even though the tax is fully collectible, and that penalties and certain interest charges should be "compromisable wherever justice, equity, or public policy seems to justify the compromise. . . ." Letter from Treasury Department, XIII-47–7137 (July 31, 1933).

Attorney General Cummings replied that "[t]here is much to be said for the proposition that a liberal rule should exist, but my opinion is that if such a course is to be taken it should be at the instance of Congress. I conclude that where liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect, there is no room for 'mutual concessions,' and therefore no basis for a 'compromise.' " Op. Atty. Gen. 6, XIII-47–7138 (October 24, 1933). See also Op. Atty. Gen. 7, XIII-47–7140 (October 2, 1934), wherein Attorney General Cummings stated that "[t]here appears to be no statutory authority to compromise *solely* upon the ground that a hard case is presented, which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection."

Although the 1933 opinion of Attorney General Cummings is the most often cited opinion regarding the limits of the IRS' compromise authority (prior to RRA 1998), the conclusion he reached mirrored conclusions reached by a number of his predecessors. Thus, since 1868, a number of Attorneys General opined that when liability is not at issue, the Secretary's compromise authority permitted compromise only when "the full amount of the debt" could not be collected. See, e.g., 12 Op. Atty. Gen. 543 (1868); 16 Op. Atty. Gen. 617 (1879) (the Secretary's authority to compromise does not permit the "voluntary relinquishment" of any part of a lawfully assessed tax from a solvent person or corporation).

Following the issuance of Attorney General Cummings' 1933 opinion, Commissioner Helvering established a policy that IRS tax collectors should make every endeavor to secure offers that represent the taxpayer's "maximum capacity to pay." Commissioner's Statement of Policy with Respect to the Compromise of Taxes, Interest, and Penalties, July 2, 1934. Commissioner Helvering recognized that the Attorney General's opinion did not specify or quantify the amount of doubt necessary to compromise, but concluded that ". . . the Treasury Department does not propose to compromise when there is merely the possibility of doubt. The doubt as to liability or collectibility must be supported by evidence and must be substantial in character, and when such doubt exists, the amount acceptable will depend upon the degree of doubt found in the particular case." *Id.* Implementing the policy established by Commissioner Helvering, the IRS concluded that an offer premised upon doubt as to collectibility should be accepted only when the amount offered represented the maximum amount the taxpayer could pay, taking into account net equity in assets and both current and future income.

The interpretation of section 7122 adopted by Attorney General Cummings (and reflected in Treasury reg. §301.7122–1(a)), together with the "maximum capacity to pay" policy established by Commissioner Helvering, have been the fundamental guiding principles for IRS offer in compromise programs for the past 65 years. From the 1930's to the early 1990's, offers to compromise were not widely used to resolve tax cases. In the early 1990s, however, the IRS determined that expanded use of offers to compromise could contribute to more effective tax administration in two important respects. First, the IRS determined that compromise could be used as a technique to enhance overall compliance by providing taxpayers with a reasonable avenue to resolve past difficulties. Second, the IRS determined that it should make more effective use of offers to compromise to help manage the inventory of delinquent tax accounts. Accordingly, while still operating within the basic legal and policy guidelines established in the 1930's, the IRS initiated two significant changes intended to enhance the compromise program.

In 1992, the IRS adopted a new compromise policy and issued revised compromise procedures. The policy provides that an offer to compromise will be accepted when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential. As set forth in the new policy statement, the goal of the compromise program is to achieve collection of what is potentially collectible at the earliest possible time and at the least cost to the government while providing taxpayers with a fresh start toward future voluntary compliance. Policy Statement, P-5-100. In administering its policies under the offer program, the threshold question of "doubt as to liability or doubt as to collectibility" set forth in the regulations constituted a legal requirement that must be followed; once that threshold was met, however, the IRS could legally accept less than the taxpayer's maximum capacity to pay. References in the offer procedures to "maximizing collection" and "maximum capacity to pay" were replaced with "reasonably reflects collection potential." *Id.*

In determining whether an offer reasonably reflects collection potential, the IRS takes into consideration amounts that might be collected from (1) the taxpayer's assets, (2) the taxpayer's present and projected future income, and (3) third parties (e.g., persons to whom the taxpayer had transferred assets). Although most doubt as to collectibility offers only involve consideration of the taxpayer's equity in assets and future disposable income over a fixed period of time, the IRS on occasion also will consider whether the taxpayer should be expected to raise additional amounts from assets in which the taxpayer's interest is beyond the reach of enforced collection (e.g., interests in property located in foreign jurisdictions or held in tenancies by the entirety). IRM 57(10)(10).1.

The compromise program was also affected by a 1995 IRS initiative designed to ensure uniform treatment of similarly situated taxpayers. In administering its collection operations, including both the installment agreement program and the compromise program, the IRS has always permitted taxpayers to retain sufficient funds to pay reasonable living expenses. Certain commentators had asserted that there were wide variances in the type and amount of such reasonable expense allowances within and between districts. In September of 1995, the IRS adopted and published national and local standards for determining allowable expenses, designed to apply to all collection actions, including offers to compromise. National expense standards derived from the Bureau of Labor Statistics Consumer Expenditure Survey were promulgated for expense categories such as food, clothing, personal care items, and housekeeping supplies. Local expense standards derived from Census Bureau data were promulgated for housing, utilities, and transportation.

The IRS allowable expense criteria play an important role in determining whether taxpayers are candidates for compromise or installment agreements. Although offers to compromise and installment agreements are separate mechanisms for resolving outstanding tax liabilities, there often is a significant interplay between the two programs, because a taxpayer's income available to satisfy the tax liability is determined after the deduction of allowable expenses. In some cases, the allowable expense criteria may be the determining factor in whether the taxpayer receives an installment agreement or a compromise. An installment agreement must provide for payment in full of the amount of the outstanding liability through regular, periodic payments (generally monthly). I.R.C. §6159. An offer to compromise, by contrast, reflects the fact that the taxpayer has no ability to pay the liability in full. Accordingly, taxpay-

ers entering into compromise agreements can pay an amount less than the full amount due in satisfaction of the liability. Congress now has directed the Secretary to consider factors other than doubt as to collectibility and doubt as to liability in determining whether to accept an offer to compromise. Under §7122(c), added by RRA 1998, factors such as equity, hardship, and public policy will be considered in certain circumstances where such consideration will promote effective tax administration. The legislative history of this provision (H. Conf. Rep. 599, 105th Cong., 2d Sess. 289 (1998)) states that —

> . . . the conferees expect that the present regulations will be expanded so as to permit the IRS, in certain circumstances, to consider additional factors (i.e., factors other than doubt as to liability or collectibility) in determining whether to compromise the income tax liabilities of individual taxpayers. For example, the conferees anticipate that the IRS will take into account factors such as equity, hardship, and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration. The conferees anticipate that, among other situations, the IRS may utilize this new authority, to resolve longstanding cases by forgoing penalties and interest which have accumulated as a result of delay in determining the taxpayer's liability. The conferees believe that the ability to compromise tax liability and to make payments of tax liability by installment enhances taxpayer compliance. In addition, the conferees believe that the IRS should be flexible in finding ways to work with taxpayers who are sincerely trying to meet their obligations and remain in the tax system. Accordingly, the conferees believe that the IRS should make it easier for taxpayers to enter into offer-in-compromise agreements, and should do more to educate the taxpaying public about the availability of such agreements.

Another consideration for compromise cases is Chief Counsel review. Since its enactment in section 102 of the Act of July 20, 1868 (15 Stat. 166), the statute authorizing the Secretary to compromise liabilities has contained a requirement that Counsel issue opinions regarding certain of those compromises. Section 7122(b) of the Code requires that the opinion of Counsel, with the reasons therefor, be placed on file whenever a compromise is made by the IRS. Chief Counsel opinions assess both whether the offer meets the legal requirements for compromise and whether the offer conforms to IRS policy and procedure. The opinion provided by Chief Counsel, however, does not have to be in favor of compromise. Pursuant to delegated authority, district directors, service center directors, and regional directors of Appeals have the authority to accept an offer that Counsel has opined does not conform to IRS policy.

Until passage of the Taxpayer Bill of Rights II (TBOR 2), Chief Counsel review was required in all cases in which the liability compromised was $500 or more. Under TBOR 2, such an opinion is required only in cases where the compromised liability is $50,000 or more.

Explanation of Provisions

The temporary regulations continue the traditional grounds for compromise based on doubt as to liability or doubt as to collectibility. In addition, to reflect the changes made in RRA 1998, the temporary regulations allow a compromise where there is no doubt as to liability or as to collectibility, but where either (1) collection of the liability would create economic hardship, or (2) exceptional circumstances exist such that collection of the liability would be detrimental to voluntary compliance. Compromise based on these hardship and equity bases may not, however, be authorized if it would undermine compliance. Although the temporary regulations set forth the conditions that must be satisfied to accept an offer to compromise liabilities arising under the internal revenue laws, they do not prescribe the terms or conditions that should be contained in such offers. Thus, the amount to be paid, future compliance or other conditions precedent to satisfaction of a liability for less than the full amount due are matters left to the discretion of the Secretary.

The temporary regulations also add provisions relating to the promulgation of requirements for providing for basic living expenses, evaluating offers from low income taxpayers, and reviewing rejected offers, as required by RRA 1998. The temporary regulations also add provisions relating to staying collection, modifying the dollar criteria for requiring the opinion of Chief Counsel in accepted offers, and setting forth the requirements regarding waivers and suspensions of the statute of limitations. Except for the provision related to dollar criteria for Chief Counsel review, all of the additional provisions of §301.7122–1T are authorized by RRA 1998. The modification of dollar criteria for Chief Counsel review is authorized by section 503(a) of the Taxpayer Bill of Rights II.

As required by §7122(c)(2)(A) and (B), added by RRA 1998, the temporary regulations provide for the development and publication of national and local living allowances that permit taxpayers entering into offers to compromise to have an adequate means to provide for their basic living expenses. The determination whether the published standards should be applied in any particular case must be based upon an evaluation of the individual facts and circumstances presented. The Secretary will determine the appropriate means to publish these national and local living allowances.

In accordance with §7122(c)(3)(A), the temporary regulations also require the development of supplemental guidelines for the evaluation of offers from "low income" taxpayers. The temporary regulations permit the Secretary to determine which taxpayers qualify as "low income" taxpayers based upon current dollar criteria applied by the U.S. Department of Health and Human Service under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981, or any other measure reasonably designed to identify such taxpayers.

In accordance with §7122(d)(1), the temporary regulations provide that all proposed rejections of offers to compromise will receive independent administrative review prior to final rejection. Section 7122(d)(2) requires and the temporary regulations also provide that the taxpayer has the right to appeal any rejection of an offer to compromise to the IRS Office of Appeals. The temporary regulations provide, however, that when the IRS returns an offer to compromise because it was not processable under IRS procedures, because the offer was submitted solely to delay collection or because the taxpayer failed to provide requested information required by the IRS to evaluate the offer, such a return of the offer does not constitute a rejection and thus, does not entitle the taxpayer to appeal rights under this provision. In the event that an offer to compromise is returned under these circumstances and the IRS institutes collection action, the taxpayer may have the right to consideration of the whole of his

or her collection case under other provisions of the Code.

Pursuant to section 6331(k) of the Code, as amended by section 3462 of RRA 1998, the temporary regulations also provide that for offers pending on or submitted on or after January 1, 2000, no enforced collection activity may be taken by the IRS to collect a liability while an offer to compromise is pending, or for the 30 days following any rejection of an offer to compromise, or during any period that an appeal of any rejection, when such appeal is instituted within the 30 days following rejection, is being considered. Collection activity will not, however, be precluded in any case where collection is in jeopardy or the offer to compromise was submitted solely to delay collection.

Effective through December 31, 1999, the temporary regulations continue to require the taxpayer to waive the running of the statutory period of limitations on collection as a condition of acceptance of an offer to compromise. Effective January 1, 2000, waivers of the statute of limitations on collection will no longer be required for the acceptance of an offer to compromise. Instead, the statute of limitations for collection will be suspended during the period the offer to compromise is under consideration by the IRS. This provision of the temporary regulations implements section 3461 of RRA 1998.

The temporary regulations also implement section 503(a) of the Taxpayer Bill of Rights II by specifying that Chief Counsel review of an accepted offer to compromise is required only for offers in compromise involving $50,000 or more in unpaid liabilities.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that sections 553(b) & (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to these regulations. Please refer to the cross-referenced notice of proposed rulemaking published in REG–116991–98, on page 242, for the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these temporary regulations is Carol A. Campbell of the Office of Assistant Chief Counsel (General Litigation). However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§301.7122–1—[Removed]

Par. 2. Section 301.7122–1 is removed.

Par. 3. Sections 301.7122–0T and 301.7122–1T are added to read as follows:

§301.7122–0T Table of contents.

This section list the captions that appear in the temporary regulations under §301.7122–1T.

§301.7122–1T Compromises (temporary).

(a) In general.
(b) Grounds for compromise.
(c) Procedures for submission and consideration of offers.
(d) Acceptance of an offer to compromise a tax liability.
(e) Rejection of an offer to compromise.
(f) Effect of offer to compromise on collection activity
(g) Deposits.
(h) Statute of limitations.
(i) Inspection with respect to accepted offers to compromise.
(j) Effective date.

§301.7122–1T Compromises (temporary).

(a) *In general.* (1) The Secretary may exercise his discretion to compromise any civil or criminal liability arising under the internal revenue laws prior to reference of a case involving such a liability to the Department of Justice for prosecution or defense.

(2) An agreement to compromise may relate to a civil or criminal liability for taxes, interest, or penalties. Unless the terms of the offer and acceptance expressly provide otherwise, acceptance of an offer to compromise a civil liability does not remit a criminal liability, nor does acceptance of an offer to compromise a criminal liability remit a civil liability.

(b) *Grounds for compromise.* (1) *In general.* The Secretary may compromise a liability on any of the following three grounds.

(2) *Doubt as to liability.* Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. Doubt as to liability does not exist where the liability has been established by a final court decision or judgment concerning the existence or amount of the liability. See §301.7122(e)(4) for special rules applicable to rejection of offers in cases where the IRS is unable to locate the taxpayer's return or return information to verify the liability.

(3) *Doubt as to collectibility.* (i) *In general.* Doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the assessed liability.

(ii) *Allowable Expenses.* A determination of doubt as to collectibility will include a determination of ability to pay. In determining ability to pay, the Secretary will permit taxpayers to retain sufficient funds to pay basic living expenses. The determination of the amount of such basic living expenses will be founded upon an evaluation of the individual facts and circumstances presented by the taxpayer's case. To guide this determination, guidelines published by the Secretary on national and local living expense standards will be taken into account.

(iii) *Nonliable spouses.* (A) *In general.* Where a taxpayer is offering to compro-

mise a liability for which the taxpayer's spouse has no liability, the assets and income of the nonliable spouse will not be considered in determining the amount of an adequate offer, except to the extent property has been transferred by the taxpayer to the nonliable spouse under circumstances that would permit the IRS to effect collection of the taxpayer's liability from such property, e.g., property that was conveyed in fraud of creditors, or as provided in paragraph (b)(3)(iii)(B) of this section. The IRS may, however, request information regarding the assets and/or income of the nonliable spouse for the sole purpose of verifying the amount of and responsibility for expenses claimed by the taxpayer.

(B) *Exception.* Where collection of the taxpayer's liability from the assets and/or income of the nonliable spouse is permitted by applicable state law (e.g., under state community property laws), the assets and income of the nonliable spouse will be considered in determining the amount of an adequate offer except to the extent that the taxpayer and the nonliable spouse demonstrate that collection of such assets and income would have a material and adverse impact on the standard of living of the taxpayer, the nonliable spouse, and their dependents.

(4) *Promote effective tax administration.* If there are no grounds for compromise under paragraphs (b)(2) and (3) of this temporary regulation, a compromise may be entered into to promote effective tax administration when—

(i) Collection of the full liability will create economic hardship within the meaning of §301.6343–1; or

(ii) Regardless of the taxpayer's financial circumstances, exceptional circumstances exist such that collection of the full liability will be detrimental to voluntary compliance by taxpayers; and

(iii) Compromise of the liability will not undermine compliance by taxpayers with the tax laws.

(iv) *Special rules for evaluating offers to promote effective tax administration.* (A) The determination to accept or reject an offer to compromise made on the ground that acceptance would promote effective tax administration within the meaning of this section will be based upon consideration of all the facts and circumstances, including the taxpayer's record of overall compliance with the tax laws.

(B) Factors supporting (but not conclusive of) a determination of economic hardship under paragraph (b)(4)(i) include–

(*1*) Taxpayer is incapable of earning a living because of a long term illness, medical condition, or disability and it is reasonably foreseeable that taxpayer's financial resources will be exhausted providing for care and support during the course of the condition;

(*2*) Although taxpayer has certain assets, liquidation of those assets to pay outstanding tax liabilities would render the taxpayer unable to meet basic living expenses; and

(*3*) Although taxpayer has certain assets, the taxpayer is unable to borrow against the equity in those assets and disposition by seizure or sale of the assets would have sufficient adverse consequences such that enforced collection is unlikely.

(C) Factors supporting (but not conclusive of) a determination that compromise would not undermine compliance by taxpayers with the tax laws include—

(*1*) Taxpayer does not have a history of noncompliance with the filing and payment requirements of the Internal Revenue Code;

(*2*) Taxpayer has not taken deliberate actions to avoid the payment of taxes; and

(*3*) Taxpayer has not encouraged others to refuse to comply with the tax laws.

(D) *Examples.* The following examples illustrate cases that may be compromised under the provisions of paragraph (b)(4)(i):

Example 1. Taxpayer has assets sufficient to satisfy the tax liability. Taxpayer provides full time care and assistance to her dependent child, who has a serious long-term illness. It is expected that the taxpayer will need to use the equity in her assets to provide for adequate basic living expenses and medical care for her child. Taxpayer's overall compliance history does not weigh against compromise.

Example 2. Taxpayer is retired and his only income is from a pension. The taxpayer's only asset is a retirement account, and the funds in the account are sufficient to satisfy the liability. Liquidation of the retirement account would leave the taxpayer without an adequate means to provide for basic living expenses. Taxpayer's overall compliance history does not weigh against compromise.

Example 3. Taxpayer is disabled and lives on a fixed income that will not, after allowance of adequate basic living expenses, permit full payment of his liability under an installment agreement. Taxpayer also owns a modest house that has been specially equipped to accommodate his disability. Taxpayer's equity in the house is sufficient to permit payment of the liability he owes. However, because of his disability and limited earning potential, taxpayer is unable to obtain a mortgage or otherwise borrow against this equity. In addition, because the taxpayer's home has been specially equipped to accommodate his disability, forced sale of the taxpayer's residence would create severe adverse consequences for the taxpayer, making such a sale unlikely. Taxpayer's overall compliance history does not weigh against compromise.

Example 4. Taxpayer is a business that despite the adoption of a wide array of precautions, including the employment of outside auditors, suffered an embezzlement loss. Although the taxpayer reviewed and signed employment tax returns and signed checks for payment of all employment tax liabilities, the embezzling employee successfully intercepted these checks and diverted the funds. At the time taxpayer discovers the diversions, taxpayer promptly contacts the IRS and begins proceedings to obtain recovery from the employee and the auditor. Taxpayer is unsuccessful in obtaining any recovery from either the employee or the auditor. While taxpayer has accounts receivable that will satisfy the tax delinquencies, taxpayer would be unable to remain in business if those receivables were seized by the IRS. Further, while taxpayer will continue to generate some profit if permitted to remain in business, those profits would not be sufficient to pay the accrued liabilities prior to the time collection of the liabilities became barred by the statute of limitations. Taxpayer's overall compliance history does not weigh against compromise.

(E) The following examples illustrate cases that may be compromised under paragraph (b)(4)(ii):

Example 1. In October of 1986, taxpayer developed a serious illness that resulted in almost continuous hospitalizations for a number of years. The taxpayer's medical condition was such that during this period the taxpayer was unable to manage any of his financial affairs. The taxpayer has not filed tax returns since that time. The taxpayer's health has now improved and he has promptly begun to attend to his tax affairs. He discovers that the IRS prepared a substitute for return for the 1986 tax year on the basis of information returns it had received and had assessed a tax deficiency. When the taxpayer discovered the liability, with penalties and interest, the tax bill is more than three times the original tax liability. Taxpayer's overall compliance history does not weigh against compromise.

Example 2. Taxpayer is a salaried sales manager at a department store who has been able to place $2,000 in a tax-deductible IRA account for each of the last two years. Taxpayer learns that he can earn a higher rate of interest on his IRA savings by moving those savings from a money management account to a certificate of deposit at a different financial institution. Prior to transferring his savings, taxpayer submits an E-Mail inquiry to the IRS at its Web Page, requesting information about the steps he must take to preserve the tax benefits he has enjoyed and to avoid penalties. The IRS responds in an answering E-Mail that the taxpayer may withdraw his

IRA savings from his neighborhood bank, but he must redeposit those savings in a new IRA account within 90 days. Taxpayer withdraws the funds and redeposits them in a new IRA account 63 days later. Upon audit, taxpayer learns that he has been misinformed about the required rollover period and that he is liable for additional taxes, penalties and additions to tax for not having redeposited the amount within 60 days. Had it not been for the erroneous advice that is reflected in the taxpayer's retained copy of the IRS E-Mail response to his inquiry, taxpayer would have redeposited the amount within the required 60-day period. Taxpayer's overall compliance history does not weigh against compromise.

(c) *Procedures for submission and consideration of offers.* (1) *In general.* An offer to compromise a tax liability pursuant to section 7122 must be submitted according to the procedures, and in the form and manner, prescribed by the Secretary. An offer to compromise a tax liability must be signed by the taxpayer under penalty of perjury and must contain the information prescribed or requested by the Secretary. However, taxpayers submitting offers to compromise liabilities solely on the basis of doubt as to liability will not be required to provide financial statements.

(2) *When offers become pending and return of offers.* An offer to compromise becomes pending when it is accepted for processing. If an offer accepted for processing does not contain sufficient information to permit the IRS to evaluate whether the offer should be accepted, the IRS will request the taxpayer to provide the needed additional information. If the taxpayer does not submit the additional information that the IRS has requested within a reasonable time period after such a request, the IRS may return the offer to the taxpayer. The IRS may also return an offer to compromise a tax liability if it determines that the offer was submitted solely to delay collection or was otherwise nonprocessable. An offer returned following acceptance for processing is deemed pending only for the period between the date the offer is accepted for processing and the date the IRS returns the offer to the taxpayer. See paragraphs (e)(5)(ii) and (f)(2)(iv) of this temporary regulation for rules regarding the effect of such returns of offers.

(3) *Withdrawal.* An offer to compromise a tax liability may be withdrawn by the taxpayer or the taxpayer's representative at any time prior to the IRS' acceptance of the offer to compromise. An offer will be considered withdrawn upon the IRS' receipt of written notification of the withdrawal of the offer by personal delivery, or by certified mail, or upon issuance of a letter by the IRS confirming the taxpayer's intent to withdraw the offer.

(d) *Acceptance of an offer to compromise a tax liability.* (1) An offer to compromise has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative.

(2) As additional consideration for the acceptance of an offer to compromise, the IRS may request that taxpayer enter into any collateral agreement or post any security which is deemed necessary for the protection of the interests of the United States.

(3) Offers may be accepted when they provide for payment of compromised amounts in one or more equal or unequal installments.

(4) If the final payment on an accepted offer to compromise is contingent upon the immediate and simultaneous release of a tax lien in whole or in part, such payment must be made in accordance with the forms, instructions, or procedures prescribed by the Secretary.

(5) Acceptance of an offer to compromise will conclusively settle the liability of the taxpayer specified in the offer. Neither the taxpayer nor the Government will, following acceptance of an offer to compromise, be permitted to reopen the case except in instances where–

(i) False information or documents are supplied in conjunction with the offer;

(ii) The ability to pay and/or the assets of the taxpayer are concealed; or

(iii) A mutual mistake of material fact sufficient to cause the offer agreement to be reformed or set aside is discovered.

(6) *Opinion of Chief Counsel.* Except as otherwise provided in this paragraph (d)(6), if an offer to compromise is accepted, there will be placed on file the opinion of the Chief Counsel for the IRS with respect to such compromise, along with the reasons therefor. However, no such opinion will be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $50,000. Also placed on file will be a statement of—

(i) The amount of tax assessed;

(ii) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed; and

(iii) The amount actually paid in accordance with the terms of the compromise.

(e) *Rejection of an offer to compromise.* (1) An offer to compromise has not been rejected until the IRS issues a written notice to the taxpayer or his representative, advising of the rejection, the reason(s) for rejection, and the right to an appeal.

(2) The IRS may not notify a taxpayer or taxpayer's representative of the rejection of an offer to compromise until an independent administrative review of the proposed rejection is completed.

(3) *Low income taxpayers.* No offer to compromise received from a low income taxpayer may be rejected solely on the basis of the amount of the offer without evaluating whether that offer meets the criteria in paragraph (b) of this section. For purposes of this paragraph (e)(3), a low income taxpayer is a taxpayer who falls at or below the dollar criteria established by the poverty guidelines updated annually in the **Federal Register** by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981 or such other measure that is adopted by the Secretary.

(4) *Offers based upon doubt as to liability.* Offers submitted on the basis of doubt as to liability cannot be rejected solely because the IRS is unable to locate the taxpayer's return or return information for verification of the liability.

(5) *Appeal of rejection of an offer in compromise.* (i) *In general.* The taxpayer may administratively appeal a rejection of an offer to compromise to the IRS Office of Appeals (Appeals) if, within the 30-day period commencing the day after the date on the letter of rejection, the taxpayer requests such an administrative review in the manner provided by the Secretary.

(ii) *Offer to compromise returned following a determination that the offer was nonprocessable, a failure by the taxpayer to provide requested information, or a determination that the offer was submitted for purposes of delay.* Where a determination is made to return offer documents because the offer to compromise was nonprocessable, because the taxpayer failed to

provide requested information, or because the IRS determined that the offer to compromise was submitted solely for purposes of delay under paragraph (c)(2) of this section, the return of the offer does not constitute a rejection of the offer for purposes of this provision and does not entitle the taxpayer to appeal the matter to Appeals under the provisions of this section (e)(5) of this temporary regulation. However, if the offer is returned because the taxpayer failed to provide requested financial information, the offer will not be returned until an independent administrative review of the proposed return is completed.

(f) *Effect of offer to compromise on collection activity.* (1) *Offers submitted prior to and not pending on or after December 31, 1999.* For offers to compromise submitted prior to and not pending on or after December 31, 1999, the submission of an offer to compromise will not automatically operate to stay the collection of any liability. Enforcement of collection may, however, be deferred if the interests of the United States will not be jeopardized thereby.

(2) *Offers pending on or made on or after December 31, 1999.* (i) *In general.* For offers pending on or made on or after December 31, 1999, the IRS will not make any levies to collect the liability that is the subject of the compromise during the period the IRS is evaluating whether such offer will be accepted or rejected, for 30 days immediately following the rejection of the offer, and for any period when a timely filed appeal from the rejection is being considered by Appeals.

(ii) *Revised offers submitted following rejection.* If, following the rejection of an offer to compromise pending on or made on or after December 31, 1999, the taxpayer makes a good faith revision of that offer and submits the revised offer within 30 days after the date of rejection, the IRS will not levy to collect the liability that is the subject of the revised offer to compromise while the IRS is evaluating whether to accept or reject the revised offer.

(iii) *Jeopardy.* The IRS may levy to collect the liability that is the subject of an offer to compromise during the period the IRS is evaluating whether that offer will be accepted if it determines that collection of the liability is in jeopardy.

(iv) *Offers to compromise determined by IRS to be nonprocessable or submitted solely for purposes of delay.* The IRS may levy to collect the liability that is the subject of an offer to compromise at any time after it determines, under paragraph (c)(2) of this section, that a pending offer did not contain sufficient information to permit evaluation of whether the offer should be accepted, that the offer was submitted solely to delay collection, or that the offer was otherwise nonprocessable.

(v) *Offsets under section 6402.* Notwithstanding the evaluation and processing of an offer to compromise, the IRS may, in accordance with section 6402, credit any overpayments made by the taxpayer against a liability that is the subject of an offer to compromise and may offset such overpayments against other liabilities owed by the taxpayer to the extent authorized by section 6402.

(g) *Deposits.* Sums submitted with an offer to compromise a liability or during the pendency of an offer to compromise are considered deposits and will not be applied to the liability until the offer is accepted unless the taxpayer provides written authorization for application of the payments. If an offer to compromise is withdrawn, is determined to be nonprocessable, or is submitted solely for purposes of delay and returned to the taxpayer, any amount tendered with the offer, including all installments paid on the offer, will be refunded without interest. If an offer is rejected, any amount tendered with the offer, including all installments paid on the offer, will be refunded, without interest, after the conclusion of any review sought by the taxpayer with Appeals. Refund will not be required if the taxpayer has agreed in writing that amounts tendered pursuant to the offer may be applied to the liability for which the offer was submitted.

(h) *Statute of limitations.* (1) *Offers submitted prior to and not pending on or after December 31, 1999.* For offers to compromise submitted prior to and not pending on or after December 31, 1999, —

(i) if the 10-year period specified in section 6502(a) will expire prior to December 31, 2002, and

(ii) payments due under the agreement are scheduled to be made after the date upon which the 10-year period specified in section 6502(a) will expire — no offer will be accepted unless the taxpayer executes a consent to extend the statutory period of limitations on the collection of the liability involved until the date one year subsequent to the date of the last scheduled payment or until December 31, 2002, whichever is earlier.

(2) *Offers pending on or made on or after December 31, 1999.* For offers pending on or made on or after December 31, 1999, the statute of limitations on collection will be suspended while collection is prohibited under paragraph (f)(2) of this section.

(3) For any offer to compromise, the IRS may continue to require, where appropriate, the extension of the statute of limitations on assessment. However, in any case where waiver of the running of the statutory period of limitations on assessment is sought, the taxpayer must be notified of the right to refuse to extend the period of limitations or to limit the extension to particular issues or particular periods of time.

(i) *Inspection with respect to accepted offers to compromise.* For provisions relating to the inspection of returns and accepted offers to compromise, see section 6103(k)(1).

(j) *Effective date.* Except as otherwise provided, this section applies to offers to compromise submitted on or after **July 21, 1999,** through **July 19, 2002.**

Charles O. Rossotti,
Commissioner of Internal Revenue.

Approved July 14, 1999.

Donald C. Lubick,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on July 19, 1999, 8:45 a.m., and published in the issue of the Federal Register for July 21, 1999, 64 F.R.39020)

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Compromises

REG–116991–98

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In T.D. 8829, on page 235, the IRS is issuing temporary regulations relating to the compromise of tax liabilities. These regulations provide additional guidance regarding the compromise of internal revenue taxes. The temporary regulations reflect changes to the law made by the Internal Revenue Service Restructuring and Reform Act of 1998 and the Taxpayer bill of Rights II. The text of the temporary regulations also serves as the text of these proposed regulations.

DATE: Written or electronically generated comments and requests for a public hearing must be received by **October 19, 1999.**

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–116991–98), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG–116991–98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.gov/prod/tax_regs/comments.html.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Carol A. Campbell, (202) 622-3620 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations in T.D. 8829 amend the Procedure and Administration Regulations (26 CFR part 301) under section 7122 of the Internal Revenue Code. The temporary regulations reflect the amendment of section 7122 by section 3462 of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 1998") Public Law, 105–206, (112 Stat. 685, 764) and by section 503(a) of Taxpayer Bill of Rights II Public Law 104-168, (110 Stat. 1452, 1461).

The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805 (f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronically generated comments that are submitted timely to the IRS. The IRS generally requests any comments on the clarity of the proposed rule and how it may be made easier to understand.

Section 3462 of RRA 1998 and its legislative history provide for the consideration of factors such as equity, hardship, and public policy in the compromise of tax cases, if such consideration would promote effective tax administration. The legislative history also states that the IRS should use this new compromise authority "to resolve longstanding cases by forgoing penalties and interest which have accumulated as a result of delay in determining the taxpayerís liability." H. Conf. Rep. 599, 105th Cong., 2d Sess. 289 (1998). The text of the temporary regulation provides the authority to compromise cases involving issues of equity, hardship, and public policy, if such a compromise would promote effective tax administration. The temporary regulation provides factors to be considered and examples of cases that could be compromised under this authority when collection of the full amount of the tax liability would create economic hardship. The temporary regulation also provides limited examples of cases that could be compromised when the facts and circumstances presented indicate that collection of the full tax liability would be detrimental to voluntary compliance. The temporary regulation does not contain examples of longstanding cases that could be compromised to promote effective tax administration when penalties and interest have accumulated as the result of delay by the Service in determining the tax liability.

The public is specifically encouraged to make comments or provide examples regarding the particular types of cases or situations in which the Secretaryís authority to compromise should be used because: (1) collection of the full amount of tax liability would be detrimental to voluntary compliance or (2) IRS delay in determining the tax liability has resulted in the accumulation of significant interest and penalties. In formulating comments regarding delay in interest and penalty cases, consideration should be given to the possible interplay between cases compromised under this provision and the relief accorded taxpayers under I.R.C. § 6404(e).

All comments will be available for public inspection and copying.

A public hearing may be scheduled if requested in writing by a person that

timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register.**

Drafting Information

The principal author of these regulations is Carol A. Campbell, Office of the Assistant Chief Counsel (General Litigation) CC:EL:GL, IRS. However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR Part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Paragraph 2. Section 301. 7122–1 is added to read as follows:

§ 301.7122–1 Compromises.

[The text of this proposed section is the same as the text of § 301.7122–1T published in T.D. 8829, on page 235.]

Charles O. Rossotti,
Commissioner of Internal Revenue.

(Filed by the Office of the Federal Register on July 19, 1999, 8:45 a.m., and published in the issue of the Federal Register for July 21, 1999, 64 F.R. 39106)

Boyd Gaming Corporation v. Commissioner

Announcement 99–77

The Service (1) acquiesces in the opinion, (2) withdraws proposed training materials relating primarily to the application of section 119 of the Internal Revenue Code to employer-provided meals in the hospitality industry, and (3) terminates the settlement initiative related to this issue.

The Internal Revenue Service (Service) announces three actions as a result of the opinion of the United States Court of Appeals for the Ninth Circuit in *Boyd Gaming Corporation v. Comm'r,* ___ F.3d ___ (9th Cir. May 12, 1999), reversing T.C. Memo 1997–445 T.C. Dkt. Nos. 3433–95, 3434–95 (1997).

First, the Solicitor General has decided not to file a petition for a writ of certiorari with the United States Supreme Court with respect to the Ninth Circuit's opinion. Accordingly, the Service announces today that it acquiesces in the Ninth Circuit's opinion in *Boyd Gaming Corporation*. The acquiescence will appear in 1999–32 I.R.B. (August 9, 1999), and a copy of the Action on Decision memorandum in support of that acquiescence accompanies this announcement.

Second, the Service withdraws the proposed training materials described in Announcement 98–77, 1998–34 I.R.B. 30. See also Announcement 98-100, 1998–46 I.R.B. 42. These materials relate primarily to the application of section 119 of the Internal Revenue Code to meals provided to employees in the hospitality industry.

Finally, the Service terminates the settlement initiative relating to employee meals described in Announcement 98–78, 1998–34 I.R.B. 30. Pending cases involving this issue will be resolved on the basis of their particular facts in light of the Ninth Circuit's opinion in *Boyd Gaming Corporation* and the Service's acquiescence in that opinion.

The principal author of this announcement is Thomas Burger, Director, Office of Employment Tax Administration and Compliance (OETAC). For further information regarding this announcement contact Mr. Burger at (202) 622-3650 (not a toll-free call).

ACTION ON DECISION

Subject: Boyd Gaming Corporation v. Commissioner, __F.3d__ (9th Cir. 1999), rev'g T.C. Memo. 1997–445 T.C. Dkt. Nos. 3433–95, 3434–95

Issue: Whether a meal furnished by the taxpayer/employer on its business premises to an employee is furnished for "the convenience of the employer" within the meaning of that phrase in section 119 of the Internal Revenue Code.

Discussion: Section 119 of the Internal Revenue Code provides that an employee's gross income does not include the value of any meal furnished to him in kind by or on behalf of his employer for the convenience of the employer if the meal is furnished on the employer's business premises. Treas. Reg. § 1.119–1(a)-(2) provides that a meal is furnished for "the convenience of the employer" if it is furnished for a substantial noncompensatory business reason of the employer. Whether an employer-provided meal is furnished for "the convenience of the employer" is important to the employer for federal tax purposes because the interplay of sections 119, 132, and 274 of the Internal Revenue Code determines whether the employer can fully deduct the cost of the meal.

During the years in issue, the taxpayer furnished free meals on its business premises to all of its employees, most of whom were required to stay on the taxpayer's business premises during their working hours primarily because of the particular security concerns of the casino industry. The taxpayer argued that, because its employees were required to remain on its business premises during their working hours, the meals it provided to its employees were provided for a substantial noncompensatory business reason.

The Tax Court held that the taxpayer's stay-on-the-business-premises requirement did not satisfy the convenience-of-the-employer requirement of section 119, determining that there must be a "closer and better documented connection between the necessities of the employer's business and the furnishing of free meals."

The Ninth Circuit reversed the Tax Court decision. The Ninth Circuit found that the taxpayer's particular security and other business-related concerns provided sufficient justification for its policy of requiring employees to stay on the employer's business premises to satisfy "the convenience of the employer" test of section 119. Specifically, the Ninth Circuit stated that –

> Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons. While reasonable minds might differ regarding whether a "stay-on-the-premises" policy is necessary for

security and logistics, the fact remains that the casinos here operate under this policy. Given the credible and uncontradicted evidence regarding the [business] reasons underlying the "stay-on-the-premises" policy, it is inappropriate to second guess these reasons or to substitute a different business judgment for that of Boyd.

In light of the Ninth Circuit's opinion, the Service will not challenge whether meals provided to employees of casino businesses similar to that operated by Boyd Gaming meet the section 119 "convenience of the employer" test where the employer's business policies and practices would otherwise preclude employees from obtaining a proper meal within a reasonable meal period. A bona fide and enforced policy that requires employees to stay on the employer's business premises during their normal meal period is only one example of the type of business practice that could justify the employer's providing of meals that would qualify for section 119 treatment. Another example could be a practice requiring "check-out" procedures for employees leaving the premises in order to address the same type of security concerns that were relevant in Boyd Gaming where these procedures have the same practical effect.

More generally, in applying section 119 and Treas. Reg. § 1.119–1, the Service will not attempt to substitute its judgment for the business decisions of an employer as to what specific business policies and practices are best suited to addressing the employer's business concerns. By the same token, to paraphrase the Ninth Circuit, "it would not [be] enough for [an employer] to wave a 'magic wand' and say it had a policy in order [for meals to qualify under section 119]." Thus, the Service will consider whether the policies decided upon by the employer are reasonably related to the needs of the employer's business (apart from a desire to provide additional compensation to its employees) and whether these policies are in fact followed in the actual conduct of the business. If such reasonable procedures are adopted and applied, and they preclude employees from obtaining a proper meal off the employer's business premises during a reasonable meal period, section 119 will apply.

Recommendation: Acquiescence

Reviewer: Paul C. Feinberg,
Special Counsel.

Approved: Stuart L. Brown,
Chief Counsel.

By: Nancy J. Marks,
Acting Associate Chief Counsel, (Employee Benefits and Exempt Organizations).

THIS DOCUMENT IS NOT TO BE RELIED UPON OR OTHERWISE CITED AS PRECEDENT BY TAXPAYERS

Internal Revenue Service to Make Litigation Guideline Memoranda Available for Public Inspection

Announcement 99–81

On July 22, 1999, the Internal Revenue Service (IRS) will make, among other documents, Litigation Guideline Memoranda (LGMs), issued between January 1, 1986, and October 20, 1998, available for public inspection. Section 3509(d)(2)(A) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105–206, required that certain types of "Chief Counsel Advice" be made available for public inspection at this time. In general, Chief Counsel Advice is advice about the tax laws written by the National Office of Chief Counsel to field offices, including District Counsel, Examination and Appeals.

As reflected in Chief Counsel Notice N(32)210–1 (April 18, 1988) LGMs "provide information and instruction relating to litigating procedures and methods, and standards and criteria on issues and matters of significant interest to litigating attorneys in the Office of Chief Counsel." However, "each [LGM] represents the litigating position criteria and procedures of the Office of Chief Counsel as of the date of issuance and may not represent the current position." Because some of the LGMs do not represent current Chief Counsel position, they may have been designated internally as "obsolete." This designation will not necessarily be apparent on the face of the document. Despite the fact that the Chief Counsel attorneys no longer follow the guidance and instructions set forth in obsolete LGMs, all LGMs issued between 1986-1998 are being made publicly available. It is anticipated that the IRS will make available to the public a Title Index that identifies which LGMs are current and those that have been obsoleted.

Pursuant to § 3509 of RRA 98, Congress has authorized the IRS to delete taxpayer identifying details and information that is exempt from public disclosure under the Freedom of Information Act (FOIA). *See* § 6110(i)(3). The FOIA deletions will be made only if it is determined that disclosure might "seriously impede or nullify IRS activities in carrying out a responsibility or function;" for example, jeopardize an ongoing investigation or judicial proceeding or that would be harmful to other interests specified in the FOIA. IRM 1230, Internal Management Document System Handbook, at text 293(2). After the documents have been made available to the public, the correctness of the deletion of any information may be challenged under section 6110.

Documents released under this process will be found in the Freedom of Information Room, 1111 Constitution Ave., NW, Washington, DC 20224, where they may be read and copied by the public during the hours 9:00 A.M. to 4:00 P.M.

The public is cautioned that LGMs may not be used or cited as precedent. *See* § 6110(k)(3).

The principal author of this announcement is Andrea Tucker of the Office of the Associate Chief Counsel (Domestic). For further information regarding this announcement contact Andrea Tucker on (202) 622-4540 (not a toll-free call).

Recovery Period for Certain Personal Property Used in Rental Real Estate Activities; Correction

Announcement 99–82

The 1998 instructions for **Form 4562,** Depreciation and Amortization, and **Publication 527**, Residential Rental Property, classify certain personal property used in a rental real estate activity (appliances,

carpeting, furniture, etc.) as 7-year property. The correct classification is 5-year property. This property is included in Asset Class 57.0, Distributive Trades and Services (see Rev. Proc. 87–56, 1987–2 C.B. 674). Therefore, the correct recovery period to be used for the regular tax is 5 years under the General Depreciation System (GDS) and 9 years under the Alternative Depreciation System (ADS).

When using a 5-year recovery period for this property for the regular tax, any alternative minimum tax (AMT) adjustment generally must be figured using a 9-year recovery period. However, if the property was placed in service after 1998, the same recovery period applies for both the regular tax and the AMT.

The action, if any, to be taken is determined for each property based on when the property was placed in service.

- For property placed in service during any tax year for which a return has not yet been filed, taxpayers must use a 5-year recovery period under GDS (9 years under ADS). For the AMT, taxpayers must use a 9-year recovery period for property placed in service before 1999.
- For property placed in service during the most recent tax year for which a tax return has been filed, the taxpayer may do either of the following:

  1. Continue to depreciate the property using a 7-year recovery period under GDS (12 years under ADS). For the AMT, continue using a 12- year recovery period for property placed in service before 1999.

  2. File an amended return for that year to change the recovery period from 7 years to 5 years under GDS (12 years to 9 years under ADS). For the AMT, use a 9-year recovery period on that amended return for property placed in service before 1999.
- For property placed in service during any tax year prior to the most recent tax year for which a tax return has been filed, the taxpayer may do either of the following:

  1. Continue to depreciate the property using a 7-year recovery period under GDS (12 years under ADS). For the AMT, continue using a 12- year recovery period for property placed in service before 1999.

  2. File **Form 3115,** Application for Change in Accounting Method, to change to a 5-year recovery period under GDS (9 years under ADS). Also use Form 3115 to change to a 9-year recovery period for the AMT for property placed in service before 1999. The change is automatic and no user fee is required, but Form 3115 must be filed. See Rev. Proc. 98–60, 1998–51 I.R.B. 16, for details on how to make the change and file Form 3115.

You can obtain Form 3115 and its separate instructions by telephone or by using IRS electronic information services.

Approved July 20, 1999.

Sheldon D. Schwartz,
National Director, Tax Forms and Publications Division.

Request by–	Number or Address
Telephone	1-800-TAX-FORM (1-800-829-3676)
Personal computer: World Wide Web File Transfer Protocol Telnet	 www.irs.ustreas.gov ftp.irs.ustreas.gov iris.irs.ustreas.gov
Direct Dial (by modem)	703-321-8020

Foundations Status of Certain Organizations

Announcement 99–83

The following organizations have failed to establish or have been unable to maintain their status as public charities or as operating foundations. Accordingly, grantors and contributors may not, after this date, rely on previous rulings or designations in the Cumulative List of Organizations (Publication 78), or on the presumption arising from the filing of notices under section 508(b) of the Code. This listing does *not* indicate that the organizations have lost their status as organizations described in section 501(c)(3), eligible to receive deductible contributions.

Former Public Charities. The following organizations (which have been treated as organizations that are not private foundations described in section 509(a) of the Code) are now classified as private foundations:

Center for Art and Earth Inc., New York, NY
George A. Boyce Military Museum, Tempe, AZ
Help Ourselves Project, Philadelphia, PA
Medcetera Education Foundation, Inc., Bellaire, TX
Memorial Neighborhood Health Centers Inc., South Bend, IN
Moose-Willow Sportsman Club, Hill City, MN
United States Amateur Basketball Association Inc., Ft. Worth, TX
United States Army Command and General Staff College Alumni, Ft. Leavenworth, KS
United States Coalition for Education for All Inc., Arlington, VA
United States Medical Triathlon Association Inc., Roanoke, VA
United States Water Fitness, Boynton Beach, FL
United Victim Recovery Service, Toledo, OH
United Way of Scott County Indiana Inc., Scottsburg, IN
Unity Community Center of South Jersey Incorporated, Camden, NJ
Unity to Assist Humanity Alliance, Salt, Lake City, UT
Universal Awareness Association Inc., Phoenix, AZ
Universal Community & Housing Development Corporation, Detroit, MI
Universal Ministries Inc., Pittsburgh, PA
University Ophthalmic Consultants of Washington PC, Washington, DC
Unlimited Senior Housing Inc., Uniontown, PA
Upper Michigan Central Model RR Club, Wells, MI
Upper Rio FM Society Inc., Albuquerque, NM
Villa D Ames Organization Intent on Changing Its Environment, Marrero, LA
Upstreet Educational Media Inc., Scottsdale, AZ
Upward Movement Nutritional Service,

Houston, TX
Urban Agriculture Network, Washington, DC
Urban Christian Ministries Inc., Arlington Heights, IL
Urban Genesis Inc., Philadelphia, PA
Urban Harvest Ministries Inc., Beaumont, TX
Urban Life Challenge Inc., Paterson, NJ
Urban Ministries of Springfield Inc., Jacksonville, FL
Urban Shelters of America Inc., Chicago, IL
Urban Vision Inc., Richmond, VA
USA Compete Inc. A Non-Profit Corporation, Greeley, CO
USA Karate Federation of New Mexico, Albuquerque, NM
Utah Harvest, Sandy, UT
Utah Head and Spinal Cord Injury Prevention Program, Salt Lake City, UT
Utah Taxpayers Legal Foundation, Salt Lake City, UT
Ute Pass Field of Dreams Inc., Cascade, CO
Uvalde Youth Rodeo Club, Uvalde, TX
VIPs Performing Dance Company Inc., Wilmington, NC
Valley Christian Radio Inc., Littleton, CO
Valley Youth Athletic Parks Boosters Inc., Lucasville, OH
Variety Clubs of Colorado Inc., Englewood, CO
Vaut Association, Riverdale, IL
Venable Apartments Inc., Owensboro, KY
Vernon Daniels Evangelistic Association, Norman, OK
Vestavia Hills Chamber of Commerce Foundation, Birmingham, AL
Vet-Group Inc., W. Monroe, LA
Veteran Information and Service Center, Columbus, OH
Veterans Action Force USA Inc., Tucker, GA
Veterans Foodlocker and Relief Fund, Lisbon, OH
Veterans Support Task Force Inc., Madison, WI
Victim Protection Services, Denver, CO
Victims of Choice & Abortions Legacy Inc., Snellville, GA
Victorious Living Foundation Inc., Broken Arrow, OK
Victory Museum Foundation Inc., Hinesville, GA
Victory Videos Inc., Florence, KY
Video Portrait Society of America Inc., Denver, CO
Video Vista of New York Ltd., New York, NY
Villa Vista Nonprofit Housing Corporation, Saginaw, MI
Village Association of Batavia Inc., Cincinnati, OH
Village Puppet Theatre Inc., Covington, KY
Vincennes Area Youth Adult Ministries Inc., Vincennes, IN
Vinita Unlimited Inc., Vinita, OK
Virginia Association of Black Women Attorneys, Midlothian, VA
Virginia Caring Program Inc., Richmond, VA
Virginia Theatrical Society Inc., Chesapeake, VA
Vision International Inc., Hays, KS
Vision Music Ministries, Gastonia, NC
Visions Studio for the Creative Arts, De Soto, TX
Visions Unfolding Incorporated, Houston, TX
Vocational Technical Educational Foundation of Delaware, Woodside, DE
Voice for Life, Colorado Springs, CO
Voice of Freedom Inc., Washington, DC
Voice of Triumph Ministries Inc., Tucson, AZ
Voices for Life, Houston, TX
Volunteer Center of the Lowcountry Inc., Charleston, SC
Volunteer Emergency Services Support Group, Hernando, MS
Volunteer Firemens Association, Calumet, OK
Volunteer for AIDS Information and Service, Dallas, TX
Volusia Surf Lifesaving Association Inc., Daytona Beach, FL
Voters Against Sexual Abuse Inc., Grand Rapids, MI
Walker Mill Towne Affordable Home Ownership Corporation, Seat Pleasant, MD
We Stay-Nos Quedamos Inc., Bronx, NY
West Bank Safety Center, Minneapolis, MN
World Outreach International, Detroit, MI
Yenping Association Inc., New York, NY
Zachary & Elizabeth M. Fisher Medical Foundation, Inc., New York, NY
Zichron Chaim Shlomo, Passaic, NJ

If an organization listed above submits information that warrants the renewal of its classification as a public charity or as a private operating foundation, the Internal Revenue Service will issue a ruling or determination letter with the revised classification as to foundation status. Grantors and contributors may thereafter rely upon such ruling or determination letter as provided in section 1.509(a)–7 of the Income Tax Regulations. It is not the practice of the Service to announce such revised classification of foundation status in the Internal Revenue Bulletin.

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in law or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in the new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C.—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contribution Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign Corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statements of Procedral Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 1999–1 through 1999–26 will be found in Internal Revenue Bulletin 1999–27, dated July 6, 1999.

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[1] A cumulative finding list for previously published items mentioned in Internal Revenue Bulletins 1999–1 through 1999–26 will be found in Internal Revenue Bulletin 1999–27, dated July 6, 1999.

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